UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DISH NETWORK CORPORATION	§	**CASES**	**16-CA-173719**
	§		
Respondent,	§		**16-CA-173720**
	§		
	§		**16-CA-173770**
	§		
and	§		**16-CA-177314**
	§		
	§		**16-CA-177321**
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	§		**16-CA-178881**
	§		
	§		**16-CA-178884**
Charging Party.	§		

CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S ANSEWRING BRIEF IN OPPOSITION TO RESPONDENT DISH NETWORK CORPORATION'S EXCEPTIONS TO THE DECISION OF THE ADMINISTARTIVE LAW JUDGE

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Table of Contents

Table of Authorities

Cases

Statutes and Rules

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DISH NETWORK CORPORATION	§	**CASES**	**16-CA-173719**
	§		
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	§		
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	§		
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COMES NOW Charging Party Communications Workers of America ("CWA," "the Union" or "Charging Party") and files pursuant National Labor Relations Board ("the Board" or "NLRB") Rule 102.46(d)(1) and (j) this answering brief in opposition to the February 21, 2017 exceptions filed by Respondent Dish Network Corporation ("Respondent" or "Dish") with the Board, and would respectfully show the following:

I. Findings of the Administrative Law Judge

This case concerns Dish's facilities in Farmers Branch, Texas ("Farmers Branch" or "FB") and North Richland Hills, Texas, ("North Richland Hills" or "NRH") which were organized by CWA in 2011. (Administrative Law Judge Decision JD-02-17 ("Decision"), p. 14). Administrative Law Judge Robert A. Ringler ("the ALJ") on January 23, 2017 issued the decision in this case from which Dish filed its February 21, 2017 exceptions.

The ALJ found that Dish had not met its burden in proving the existence of a legitimate impasse between the parties and was therefore "not privileged to unilaterally implement its final offer." (Decision, p. 14). Dish therefore violated Section 8(a)(5) of the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. § 158(a)(5), when it unilaterally "Implemented its final offer on April 23, 2016 and, thereafter, unilaterally changed terms and conditions of employees . . . in the absence of a valid bargaining impasse," and that Dish "Unilaterally changed wages, health insurance coverage, leave benefits, and other terms and conditions of employment since April 23, 2017." (Id., p. 18, ¶ 7(c)-(d)). The ALJ further held that Dish remained under "an ongoing obligation to meet and bargain over wages, hours, and other terms and conditions of employment" concerning the FB and NRH locations and therefore also violated Section 8(a)(5) by failing to meeting CWA "at reasonable time for purposes of collective bargaining since January 13, 2016, after prematurely declaring impasse." (Id., pp. 14, 18, ¶ 7(a)). The ALJ also held that Section 8(a)(5) was violated by Dish when it refused to bargain with CWA by conditioning bargaining on a permissive bargaining subject, specifically CWA holding a ratification vote. (Id., pp. 12, 18, ¶ 7(b)). Dish filed exceptions to these findings by the ALJ.

The ALJ also found that Dish violated Section 8(a)(3) when it constructively discharged Marcus Tillman, David Dingle, Justin Ripley, Kenneth "Blake" Daniel, Bryce Benge, Salvador Bernardino, Preston Dutton, Robert Thompson, John Carson, Scott Dehart, Robert MacDonald, Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns, Christopher Little, and Michael Cater by presenting those employees "with the 'Hobson's choice' of continuing to work versus forgoing Section 7 rights." (Id., pp. 16-17, 18, ¶ 6)). Dish also filed exceptions to these findings.

The ALJ also found Dish guilty of violations of the Act from which Dish did not file exceptions. Dish was held to have violated Section 8(a)(1) of the Act when on April 6, 2016 Field Service Manager Hanns Obere sent NRH bargaining unit employee Blake Daniel a text message that stated

> The union is gone. Techs will be affixed hourly rates, no pi. Level 4 will earn 17 dollars an hour. They will earn like the rest of the company if they transfer to other offices which they encourage. They have QPC till the 23rd. The two offices are gradually closing. We will be dispatched to other offices or a new one will be started. They would rather have the techs quit en masse….

(Id., pp. 9, 15, 17-18, ¶5(a); see also General Counsel Exhibit ("GC") 31). The ALJ also found Supervisor Waeland Thomas to have violated Section 8(a)(1) on July 6, 2016 when he instructed employees not to discuss CWA or the Quality Performance Compensation ("QPC"), the performance-based incentive program that Dish unlawfully eliminated on April 23, 2016, with new hires. (Decision, pp. 11, 15-16, 18, ¶ 5(b)). Thomas was also found to have violated Section 8(a)(1) by creating an unlawful impression of surveillance. (Id., pp. 11, 15-16, 18, ¶ 5(c)). Dish also did not file exceptions to the finding that it violated Section 8(a)(5) of the Act when it "Unilaterally changed its disciplinary policy and discharged unit employee Dakota Novak, by failing to afford the Union pre-implementation notice of his contemplated discipline, and the opportunity to bargain." (Id., p. 18, ¶ 7(e)).

CWA opposes in their entirety the exceptions filed by Dish challenging the ALJ's findings as to issues raised in Respondent's exceptions. CWA argues, as developed fully below, that the reasoning of the ALJ as to these violations is sound and should be adopted by the Board. In the alternative, CWA asserts that there are other grounds on which the Board could sustain finding violations of the Act based on the conduct of Dish at issue in this case.

II. The Premature Impasse and the Unlawful Unilateral Changes

The ALJ's central holding in his January 23rd decision is that Dish violated Section 8(a)(5) of the Act when it prematurely declared impasse, refused to meet with CWA, and committed unlawful unilateral changes in wages and benefits. (Decision, pp. 12-14, 18, ¶¶ (a)-(d)). The ALJ first held that the Union's December 9, 2014 proposal offered a significant QPC compromise when it proposed a two-tier wage system that preserved QPC for current employees and proposed a wage scale for new hires, which "estopped bargaining from reaching an impasse." (Id., p. 12). Second, the ALJ concluded that Dish itself "prevented legitimate impasse" when it conditioned further negotiations on the Union submitting Dish's final offer for a ratification vote, a non-mandatory subject of bargaining, which tainted Dish's claim that the parties were at impasse. (Id., pp. 12-13). Third, the ALJ found that the hiatus between the last bargaining session in November 2014 and the April 2016 unilateral implementation undermined the Company's claim that an impasse existed. (Id., p. 13). Fourth, the ALJ concluded that the change in Dish's bargaining representative "amplified the possibility of agreement, which also cuts against an impasse finding." (Id.). Fifth, and final, Dish's unwillingness to reschedule the December 2014 bargaining dates undermined its claim that the parties were at impasse at the end of 2014. (Id., pp. 13-14).

The propriety of the ALJ's rulings that no impasse existed, the unilateral changes made in April 2016 were unlawful, and Dish failed to meet and bargain with CWA will be established below. First, an overview of the bargaining history is necessary to establish where the parties were in terms of bargaining by April 2016. Then each point relied on by the ALJ will be addressed in support of the decision's conclusions and in opposition to the exceptions filed by Dish.

a. *Bargaining history between the Parties*

The ALJ made comprehensive findings of fact related to the parties' bargaining history that support his finding that there was no impasse that privileged the unilateral changes that the ALJ held violated Section 8(a)(5). Those findings are incorporated herein, and are supplemented to citations in the record as follows.

The QPC compensation system predated the filing for NLRB elections at FB and NRH. The QPC features a low base wage and requires employees to meet certain performance criteria in order to earn a higher, sometimes significantly higher, incentive pay. (Charging Party Exhibit ("CP") 62). The QPC's low base wage was a major factor in NRH and FB voting for the Union as their representative for the purpose of collective bargaining. Dish Network Corp., 358 NLRB 174, 177 (2012).

The parties began bargaining in the summer of 2010 and met periodically throughout the following years. During the course of negotiations, the Union, through its bargaining chair CWA Staff Representative Donna Bentley, proposed twice in 2013 an hourly wage scale that would remove the QPC and return to a compensation system with a higher hourly rate and Pi, Dish's incentive plan in place at its other facilities. (Transcript ("Tr.") 323; GC 12; GC 13). Dish rejected these proposals because, as testified to by Dish negotiator George Basara, it wanted to continue to drive the Union's proposals further down by holding on just an hourly wage rate with no incentive. (Tr. 1080). The Union would later learn that providing the bargaining unit employees with no incentive would save Dish 2.1 million dollars over a three year period. (Tr. 451-52; GC 90). Dish's rejections in March and May 2013 of the Union's Pi proposals prompted the Union to return to proposing the continuation of the QPC beginning on July 9,

2013 because of the lack of reciprocal movement on the part of Dish. (Tr. 366, 386; Respondent Exhibit ("R") 1).

Wages aside, the parties reached accord on approximately eighteen issues during the course of bargaining. (Tr. 374; R 3). On November 21, 2013, approximately five topics, wages, seniority, grievance and arbitration, dues deduction and contracting, remained. (Tr. 375; R 2). The Union proposed maintaining QPC, withdrawing seniority, subcontracting, and dues deduction, and adopting Dish's grievance proposal, which did not include arbitration, in an effort to obtain a contract. (Tr. 447-48; R 2). Dish rejected this proposal and held to its prior proposal of May 31, 2013. (GC 49, p. 3).

The parties next met on July 23, 2014 because of Dish's unwillingness to meet during the pendency of a decertification petition for the FB unit. (Tr. 456; GC 49, pp. 1-2). The Union prevailed in the decertification election per the May 29, 2014 tally of ballots. (GC 108). The parties bargained on July 23-24, 2014. (Tr. 456, 459). The parties scheduled November 4-6 and 18-20, 2014 fir further bargaining, but Dish canceled the November 4-6 dates because of a conflict with the schedule of its human resources representative, Pam Arnold. (Tr. 1153-54; CP 125, p. 2). This cancellation was consistent with the parties' practice of accommodating one another's schedule. (*See* Tr. 344-47; GC 63, GC 64). CWA requested replacement dates for the November 6-8 sessions in an email dated October 31, 2014 (CP 125, p. 1) and December 8-9, 2014 were ultimately confirmed as the replacement dates. (GC Ex. 55, p. 1).

The parties bargained again on November 18-20, 2014. (Tr. 470). CWA Assistant to the Vice President Sylvia Ramos, who had assumed the role of bargaining chair for the Union following Bentley's retirement, could not attend the November 18-19 sessions due to a schedule conflict. (Tr. 470). The Union provided Dish with a comprehensive package of proposals,

including wages, over the course of November 18-19. (CP 58, CP 60). This proposal included maintaining the QPC and a wage progression over the course of three years for Inventory Specialists, $15.50 to $17.50, and Senior Inventory Specialists, ranging from $16.00 to $18.00. These job titles are the two warehouse positions represented by CWA at North Richland Hills and Farmers Branch. (CP 60, p. 1).

These proposals were rejected by Dish (R 5, p. 1), which countered with its "Final Proposal" dated November 18th but passed to CWA on November 19th. (GC 2). Dish's November 19th wage proposal for the life of the agreement had FSS Is earning $13.00 per hour, FSS IIs earning $14.00 per hour, FSS IIIs earning $16.00 per hour, FSS IVs earning $17.00 per hour, ISPs earning $11.50, and Senior ISPs earning $12.00. (Id.). None of the technician titles would participate in an incentive program. (Id.).

The wage rates proposed by Dish for its two union facilities were significantly lower than the normalized wage rates, which takes into account overtime and incentives, paid by Dish at its non-union facilities. Dish's wage proposal for FSS Is was $1.02 per hour to $2.70 per hour lower than what it paid at its other Dallas-Fort Worth are facilities, for FSS IIs was $2.98 per hour to $3.89 per hour lower than what it paid at its other Dallas-Fort Worth are facilities, for FSS IIIs was $2.25 per hour to $3.16 per hour lower than what it paid at its other Dallas-Fort Worth are facilities, and for FSS IVs was $3.88 per hour to $4.75 per hour lower than what it paid at its other Dallas-Fort Worth are facilities. (CP 91).

Dish's proposal for ISPs was their current wage rate. (Id.). As to Senior ISPs, Dish initially proposed a wage cut from $12.65 per hour to $12.00, but later agreed to keep the Senior ISPs at their current wage rate. This conclusion is supported by Dish's own notes on its November 19th wage proposal, which note "$12.65" besides Senior ISP and contains the

statements "Union asks about this" and "GB agrees to current." (R 4). Further, the Union's notes for November 19th indicate that Basara did not intend to cut Senior ISP wages in response to questioning by the Union and that Dish "can move to $12.65 if you want to." (R 5, p. 3). Basara's testimony that he agreed to move the ISPs to $12.65 (Tr. 1114) was contradicted by the testimony of a representative of the Union who testified that Basara only agreed to change the Senior ISP rate. (Tr. 1177-78). Basara's claim as to $12.65 ISP wage is not corroborated in the record. It is, in fact, contradicted by Dish's own notes on its proposal (R 4), as recounted above, which indicate that "GB" agreed to the current ISP wage rate and not an approximate $1.15 per hour raise.

On November 20th the parties continued to bargain and discuss Dish's November 19th proposal and Ramos returned to the table for the Union. (Tr. 471; CP 55, p.1). The Union questioned Dish about how wages in its November 19th proposal were formulated and why they were significantly lower than those of other Dish facilities in Dallas-Fort Worth area. (Tr. 551). The parties agreed to reconvene on December 8-9, 2014 to continue bargaining. (CP 132, p. 6; GC 55, p. 1).

On December 4th, CWA informed Dish that it needed to reschedule the December 8-9 bargaining dates because of the death in Ramos's mother-in-law, Guadalupe Solorio Ramos. (GC 21, p. 1; GC 32). The Union offered dates in January and February 2015. Basara responded to this correspondence by stating that he had non-refundable travel arrangements and that "If you do not meet with us as scheduled, and you also refuse to provide a proposal in writing, we will consider the bargaining to be at impasse." (GC 21, p. 1). Ramos responded to Basara later on December 4th by stating CWA would prepare proposals to Dish in response to its November 2014 proposal, but that in doing so it would not waive its right "to meet with you and discuss

face-to-face your response." (GC 22, p. 2). She also noted that in addition to the dates previously proposed by CWA she would consider any dates offered by Dish. (Id.). Basara responded on December 5th by stating "Please forward your proposals." (Id., p. 1).

CWA forwarded its proposals to Dish on December 9, 2014 and noted that the Union continued "to stand firmly on the need to bargain over our proposals." (GC 4, p. 1). CWA proposed as to wages on December 9th a two-tiered scheme whereby current technicians would remain on QPC and new hires would be placed on an hourly wage scale plus Pi. (GC 5, p. 7). The Union also proposed ISP and Senior ISP wages identical to those of its November 2014 proposal. (Id.). Dish offered later on December 9th to meet the following week. (GC 98, p. 1). Ramos responded on December 11th that she was not available for the remainder of December, but would be willing to schedule bargaining during the first two weeks of January 2015. (GC 24). Basara responded later on December 11th by asking Ramos if she was saying that she did "not have a single day to meet this entire month?" (GC 23, p. 1). Ramos responded on December 12th by reiterating she would be willing to meet during the first two weeks of January and that the Union had offered other dates later in January and February 2015. (GC 25).

On December 18, 2014, despite CWA's expressed desire to meet and discuss its December 9th proposals, Basara provided a written response (GC 3), which included Dish's "Last, Best & Final Offer." (GC 7). This proposal was similar to its November 2014 proposal, except that it raised the proposed wage rate for ISPs from $11.50 per hour to $12.65. Contrary to Basara's testimony on this issue at the hearing, recounted above, the documentary evidence of **both** parties shows that the change to $12.65 an hour on November 19th only applied to Senior ISPs. Thus, this increase showed movement on the part of Dish on wages. Basara's response

also stated Dish wanted the proposal sent to the bargaining unit for a vote and then the parties could "discuss if further bargaining is warranted." (GC 3, p. 4).

Ramos responded to Basara's December 2014 proposal on December 30, 2014. In her response, Ramos reiterated that CWA had reserved the right to bargain over its December 9th proposals and that the previously cancelled December 8-9 bargaining dates were replacement dates for November bargaining sessions that Dish cancelled. (GC 8, pp. 1-2). Basara responded on December 31st by stating that "it does not appear that you are willing to take our final offer to your bargaining unit." (GC 9, p. 1). Basara also informed Ramos that he would no longer be representing Dish and that Brian Balonick would be contacting her on behalf of Dish "sometime after new year." (Id.). Basara resigned from his law firm at the end of 2014 and Balonick testified that Dish did not contact the Union during 2015. (Tr. 63). Ramos did not attempt to contact Balonick because she had been told by Basara that Balonick would contact her and that the parties had gone eight months, from November 2013 to July 2014, without bargaining in the past, so she did find the amount of time passing to be exceptional. (Tr. 590).

Balonick contacted Ramos on January 8, 2016 and stated to Ramos that Basara's "November 19, 2014 letter to you presented DISH's last, best and final offer." (GC 10). Balonick further stated in regards to that offer that the Union was "unwilling to take it to your bargaining unit." (Id.). Balonick closed by noting that since the "November 19th" proposal was Dish's last, best and final offer, it did not appear as if "further bargaining would be productive." (Id.). Ramos responded to Balonick on January 13th and reiterated that CWA had reserved the right to bargain over its December 9th proposals and requested Balonick provide bargaining dates. (GC 11, pp. 1-2).

Balonick responded on February 2, 2016 that he viewed Ramos's letter of January 13th as evidence that "the parties have remained rigid in their respective positions." (GC 18). Ramos responded on February 3rd by requesting bargaining dates. (GC 26). Balonick responded on April 4, 2016 by informing Ramos that Dish would be implementing its December 2014 last, best and final offer. (GC 19, p. 1). Ramos responded on April 12th by again demanding bargaining dates to discuss the Union's last proposals. (GC 27, p. 3). Balonick's April 19th response to Ramos restated the assessment of the bargaining contained in his prior correspondence but also noted that "the Union refuses to vote on" Dish's last, best and final offer of December 2014. (GC 28, p. 2).

Balonick testified at the hearing that the strategy animating his dealing with Ramos and the Union during the winter and spring of 2016 was that he wanted to test them "to see how serious they were about trying to reach an agreement." (Tr. 116). Balonick went on to testify

> So I wrote that letter in January of '16 inviting them to show us something that -- anything that they were interested in a contract where it wasn't QPC. I wrote more than one letter, I know one letter was shown to me. I wrote three letters, I believe, practically begging them to show me anything, something, so that -- you know, if they showed me a new proposal, I'd be willing to meet with them. (Tr. 116-17).

Balonick dismissed out-of-hand Ramos's requests to meet and bargain. (Tr. 117). Balonick also acknowledged that the Union had proposed a wage rate for new hires while maintaining the QPC for current employees. (Tr. 118). Balonick's unwillingness to meet with the Union undermines his claim that he sought to test the Union's willingness to compromise. What better forum to see if the Union would move off of QPC than at the bargaining table? Though Balonick testified he would welcome a new proposal as evidence of the Union's willingness to move off of QPC, he never made such a suggestion in his correspondence to Ramos.

The Union, however, throughout the first half of 2016, was willing to meet and bargain. Dish at all times declined to do so and on April 23, 2016 it implemented its unlawful unilateral changes based on the pretext of impasse. As anticipated by the Obere text, the QPC ceased and FSS IVs had their wages cut to a flat $17.00 an hour with no incentive. The unilateral change to wages resulted in an approximate $0.59 to $5.26 cut per hour for FSS Is, an $8.87 to $14.04 cut per hour for FSS IIs, a $14.74 to $11.95 cut for FSS IIIs, and an $8.60 to $11.63 cut for FSS IVs. (CP 91). The impact of these cuts was noted by the United States District Court in granting, in part, injunctive relief under 10(j) of the Act, when it stated "unit employees went from earning, on average, approximately $23 to $32 per hour to earning $13 to $17 per hour." Kinard v. Dish Network Co., 2017 U.S. Dist. LEXIS 5668 at *19 (N.D.Tex. 2017).

The wages imposed by Dish for FB and NRH are significantly lower than those paid to other technicians in the Dallas-Fort Worth Area. Evidence at the hearing established the wage rates of FB and NRH employees compared to the non-union Dall-Fort Worth area Dish technicians. (CP 122A[1]; Decision, p. 1, n. 1). Farmers Branch FSS 1 employees earned after the unilateral changes a normalized wage rate, which included overtime and incentive rates paid at the offices besides FB and NRH, $13.39 per hour and NRH FSS 1 employees earned $13.33, whereas FSS 1 employees at other Dallas-Fort Worth area Dish locations earned between $14.67 and $15.33 per hour. FSS 2 employees at FB earned $15.55 per hour at NRH earned $14.56, whereas their counterparts at non-union locations earned between $16.37 and $17.25 per hour.

[1] CP 122A was described at the hearing as reflecting "wages that were earned by Technicians in the 5 offices that are so marked during the time period of May, June, and July of 2016. And this document only includes employees who worked that full time period, to ensure that we were comparing apples to apples, and we were not including employees who only worked part of the time period, with employees who worked the full time period. (Tr. 1183).

FSS 3 employees at FB earned $16.42 per hour and at NRH earned $16.92 per hour, whereas their counterparts at non-union locations earned between $18.36 and $19.89 per hour. FSS 4 employees at FB earned $17.81 per hour and at NRH earned $17.52 per hour, whereas their counterparts at non-union locations earned between $23.36 and $26.89 per hour.

Also as foreshadowed by the Obere text, numerous employees were constructively discharged as a result of the pay cut. Those discriminatees, who the ALJ ultimately found to have been constructively discharged by Dish, are Marcus Tillman, David Dingle, Justin Ripley, Kenneth "Blake" Daniel, Bryce Benge, Salvador Bernardino, Preston Dutton, Robert Thompson, John Carson, Scott Dehart, Robert MacDonald, Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns, Christopher Little and Michael Cater.

Dish made other unlawful unilateral changes in working conditions in addition to the changes in wage rates. Dish changed its sick days and paid days off to create one pool called paid time off ("PTO") on April 23, 2016. (Tr. 767, 816). Dish also changed health insurance benefits in a manner that resulted, according to bargaining unit employee Jason Morris, in deductibles doubling from $2,500.00 to $5,000.00. (Tr. 404; *see also* GC 124, p. 7). The health care benefits changed on July 1, 2016. (Tr. 825-26).

b. *Dish's declaration of impasse was premature and there was no impasse at the time of the unilateral changes*

An employer must provide the bargaining representative of its employees with notice and an opportunity to bargain before changing a mandatory subject of bargaining. NLRB v. Katz, 369 U.S. 736, 743 (1962). The existence of a lawful impasse excuses the need for such bargaining. "The general rule is that when parties are engaged in negotiations for a . . . agreement an employer's obligation to refrain from unilateral changes encompasses a duty to

refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole." Pleasantview Nursing Home, 335 NLRB 961, 962 (2001) (citing Bottom Line Enterprises, 302 NLRB 373 (1991)). In this case, Dish violated Sections 8(a)(1) and 8(a)(5) of the Act by implementing its bargaining proposals in the absence of a legitimate impasse. Cotter & Co., 331 NLRB 787, 787-88 (2000).

"The Board has defined bargaining impasse as the 'situation where 'good-faith negotiations have exhausted the prospects of concluding an agreement.'" Newcor Bay City Division, 345 NLRB 1229, 1237 (2005) (quoting Royal Motor Sales, 329 NLRB 760, 761 (1999); see also Taft Broadcasting Co., 163 NLRB 475, 478 (1967)). An employer violates the Act by implementing its final offer when it has prematurely declared impasse. Jano Graphics, Inc., 339 NLRB 251 (2003); CJC Holdings, Inc., 320 NLRB 1041, 1044-46 (1996).

The ALJ concluded for five reasons, each of which will be discussed below, that Dish declared impasse prematurely and therefore its subsequent unilateral changes in wages and benefits violated Section 8(a)(5). As developed more fully below, the ALJ's rulings, findings, and conclusions should be affirmed and adopt the recommended order as to this issue.

1. There was no impasse because of movement in the bargaining

The ALJ's first reason for finding no impasse was that Union's December 9, 2014 proposal offered a significant QPC compromise when it proposed a two-tier wage system that preserved QPC for current employees and proposed a wage scale for new hires, which "estopped bargaining from reaching an impasse." (Decision, p. 12). Dish challenges this conclusion in its exceptions by arguing that the concession was significant. (Respondent's Brief in Support of Exceptions ("Brief"), pp. 31-37). Dish's argument proceeds from the flawed premise that

movement sufficient to defeat impasse must amount to a capitulation. The precedents of the NLRB do not support such a conclusion.

In regards to this argument, it is critical to be mindful that Dish, as the party asserting an impasse, has the burden of proving that an impasse existed. Ead Motors E. Air Devices, 346 NLRB 1060, 1063 (2006) (citing Serramonte Oldsmobile, Inc., 318 NLRB 80, 97 (1995), *enf'd*. in pert. part 86 F.3d 227 (D.C. Cir. 1996)). Dish cannot claim as a matter of law that CWA's concession of a two-tier wage scale was not significant or not sufficient movement to keep negotiations going forward. The Board has found movement sufficient to defeat impasse by a labor organization offering a 10% wage reduction. A.M.F. Bowling Company, Inc., 314 NLRB 969, 980 (1994). In this case, the Union by its December 9th wage proposal conceded as to future hires that the QPC would no longer be the wage scale for field technicians. CWA's December 9th movement is also analogous to the five cent wage reduction in the second and third year of a proposed contract that was found in CJC Holdings, which the Board held showed "some progress on wages was still being made." CJC, 320 NLRB at 1045.

Proving an impasse based on the bargaining positions of the parties also requires Dish to prove in this case that the parties were deadlocked. Ead Motors at 1064. Dish cannot meet this burden because movement by both parties in November and December of 2014 shows there was no deadlock between the parties. Dish made movement in its November 19, 2014 wage proposal from its last wage proposal of May 31, 2013. CWA made movement in its proposal of December 9, 2014 by proposing a two-tiered wage structure whereby current employees would continue to be paid under the QPC and new hires would be paid based on an hourly scale along with the Pi incentive program. Dish then moved in its December 18, 2014 proposal by raising the hourly rate of Inventory Specialists from $11.50 in November 19th proposal to $12.65 in its

December 18th proposal. This trend does not support finding deadlock, rather it indicates that the parties were moving together in December 2014. Erie Brush & Manufacturing Corp., 357 NLRB No. 46 (2011) (recognizing that a party's willingness to move on its positions defeated impasse).

Dish argues in its exceptions that the ALJ's reasoning amounts to requiring Dish to make concession contrary to the proscription of Section 8(d) of the Act, which states the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). It is also true that Dish need not surrender a genuinely held position. CJC at 1045. These foundation principles of collective bargaining are shields to protect the parties' respective positions and Board law has held that they cannot be used as swords to undermine and defeat the statutory bargaining process created by the Act. The right to refuse to agree or make a concession cannot be used "'as a cloak . . . to conceal a purposeful strategy to make bargaining futile or fail.'" Id. (citing H.K. Porter Co., 153 NLRB 1370, 1372 (1965)).

Dish's arguments in its exceptions are tantamount to asserting it had no intention to reach an agreement with CWA and would seize on any pretext to support its claim that impasse was reached. Dish essential turns 8(d) on its head to allow it to argue that it need not meet with CWA over its two-tier proposal because that proposal did not go far enough to satisfy Dish. As the ALJ noted, however, the proposal did create "the real possibility of fruitful discourse, which was inexplicably left by Dish to whither on the vine for over a year before it declared impasse." (Decision, p. 12). CWA's proposal evidenced a willingness to move, and that willingness could have in face-to-face bargaining resulted in, as the ALJ also noted, "a possible resolution on the

bargaining's thorniest issue." (Id.). Dish foreclosed that possibility because, as evidenced by the Obere text, it wanted mass resignations and the ultimate closing of the units.

Dish also challenges the significance of the two-tiered proposal by arguing that it would not grant significant relief because FB and NRH had low attrition rates compared to the other, non-union, facilities in the Dallas-Fort Worth area. This comparison obscures the real attrition numbers at FB and NRH. FB had attrition of 31.40 % in 2014 and 19.60% in 2015 and the attrition at NRH was 30.50 % in 2014 and 13.10% in 2015 (R 33). These rates show attrition rates of approximately one-third to ten percent over the course of two years. Over the passage of time, if these rates were constant, the addition of replacement workers who were not paid on the QPC would significantly lower the number of employees being paid on the QPC.

Dish cannot dismiss the significance of this change by comparing it to other locations. The point is that at FB and NRH it is foreseeable under the Union proposal that over time there would be a reduction in QOC-compensated employees. This offer was therefore significant enough to open the possibility for further discussion sufficient to defeat impasse. Accordingly, the Board should affirm the ALJ's rulings, finding and conclusions as to the absence of impasse as a result of the Union's concession.

2. The parties were not at impasse because Dish unlawfully conditioned further bargaining on a ratification vote

The ALJ also concluded that Dish "prevented legitimate impasse" when it conditioned further negotiations on the Union submitting Dish's final offer for a ratification vote, a non-mandatory subject of bargaining, which tainted Dish's claim that the parties were at impasse. (Decision, pp. 12-13). An employer's insistence that a proposal be put out by a union for a ratification vote is a non-mandatory subject of bargaining that undermines the assertion of

impasse. Jano Graphic, Inc., 339 NLRB at 251. Dish demanded that CWA put its last, best and final offer out for a vote on December 18, 2014 as a condition for further bargaining. While Basara denied that it was a condition for subsequent bargaining (Tr. 1125), the language in his letter of December 18th speaks to the contrary by stating Dish asks the proposal being taken out for a vote and then "we can discuss whether further bargaining is warranted" once Dish knew if the proposal was accepted or rejected. This sentence does not make a suggestion, it says that further bargaining, which had been scheduled but reneged on by Dish, is now conditioned on a vote by the membership. Dish cannot claim the existence of a lawful impasse in December 2014 because of its insistence on a vote by the Union's membership.

Dish's insistence on a vote by the Union's membership did not end in 2014; Balonick revisited that issue twice in his correspondence to Ramos in 2016. The demand to put the contract out for a vote and the Union's failure to do so were referenced in the letter of January 8, 2016 where Balonick stated "you rejected our offer and were unwilling to take it to your bargaining unit." (GC 10) The failure to present the final offer for a ratification vote was raised again in the letter of April 19, 2016 when Dish stated the Union "failed to take [the offer] to the employees for a vote." (GC 28, p. 1) The ratification issue was raised again in the same correspondence and again in the same correspondence when it stated "the unwavering positions of the parties, i.e. that DISH has provided a last, best and final offer **that the Union refuses to vote on** and that the Union requests further bargaining sessions, **demonstrates that the parties are at impasse.**" (Id., p. 2, emphasis added). (GC 28, pp. 1-2). Thus, even as of four days prior to the unilateral changes of April 23rd, Dish continued to adhere to its position, contrary to clearly established law, that the lack of a ratification vote justified its refusal to bargain.

Dish attacks this reasoning of the ALJ by arguing that case law requires the impasse to be caused by the declaration and that in this case, the impasse already existed at the time Dish was using the promise of further bargaining as leverage to submit the contract to a ratification vote. In support of this fact, Dish correctly states that Board precedent requires the permissive subject cause the impasse. ACF Industries, LLC, 347 NLRB 1040, 1042 (2006). Dish's problem in this regard is that the facts of this case do not support its contention.

Despite Dish's erroneous assertions to the contrary that Dish did not raise the ratification issue in 2016 (Brief, p. 38), Dish **did in fact** raise it twice; on January 8, 2016 and on April 19, 2016, right before it unilaterally implemented. Dish's April 19th letter clearly creates a causal nexus between impasse and the failure to send the offer out for a vote. The April 19th letter states "DISH has provided a last, best and final offer that the Union refuses to vote on," as part of it proof in that letter "that the parties are at impasse." (GC 28, p. 2). Dish does not state in this letter that it requests a ratification vote as a means to break the impasse. Dish clearly states that the failure to seek a ratification vote is part of its contention for the existence of an impasse. This statement ties the ratification vote to the cause of the impasse in Dish's own words.

Most telling in the April 19th letter is that Dish does not raise wages as the cause of impasse. Dish states that impasse has resulted from the offer the Union has not taken a vote on and the Union's request for more bargaining. Dish cannot credibly contradict its own correspondence by arguments in its brief. The April 19th letter unequivocally states that Dish concluded impasse resulted from the failure to take the contract for a vote and thus tied its last offer to a non-mandatory subject of bargaining that undermines its arguments that impasse existed. The Board should thus affirm the ALJ's rulings, finding and conclusions as to the

absence of impasse as a result Dish conditioning further bargaining on the submission of Dish's offer for a ratification vote.

3. The passage of time from November 2014 to April 2016 weighs against finding impasse

The ALJ also ruled that Dish's declaration of impasse was premature because of the passage of time between the last bargaining session in November 2014 and the April 2016 unilateral implementation. (Id., p. 13). This holding is based on the NLRB's decision in Airflow Research & Manufacturing Co., 320 NLRB 861 (1996), where the Board held that the passage of one year "was clearly a sufficient period for cooling off and taking a second look at earlier positions." Airflow, 320 NLRB at 862 (*citing* Gulf States Mfg., Inc. v. NLRB, 704 F.2d 1390, 1399 (5th Cir. 1983)). The ALJ also relied on Circuit-Wise, Inc., 309 NLRB 905 (1992), which held that a fourteen month passage of time was sufficient to undermine an employer's claim of impasse because "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse." Circuit-Wise, 309 NLRB at 921.

As stated by the ALJ, "even assuming *arguendo* that an impasse existed in 2014, which it did not," Dish's attrition rate could have brought changed priorities to the bargaining table such that a new possibility of fruitful discussion existed. (Decision, p. 13). an Here, the passage of time from December 2014 to January 2016, coupled with the Union's willingness to compromise as expressed in its December 9th proposals, support the conclusion that if an impasse did exist in December 2014 it had passed by January of 2016 when Dish resumed correspondence with the Union or April of 2016 when it unilaterally implemented its terms.

Continuing to assume *arguendo* that impasse existed after 2014, the Pepsi-Cola-Dr. Pepper Bottling Co., 219 NLRB 1200 (1975) and Holiday Inn Downton—New Haven, 300

NLRB 774 (1990), cases cited by Dish in its brief are distinguishable from the facts of this case. In Pepsi-Cola, the Administrative Law Judge concluded that the union in that case had made a sufficient change in position based on a counter-offer, the exact terms of which were not in the record, to break an impasse. Pepsi-Cola, 219 NLRB at 1200. The Board rejected this conclusion because it held that specific terms of that offer had to be in the record so the Board could determine if they were significant enough to break an impasse. Pepsi-Cola at 1200. The union in Holiday Inn attempted to break the impasse in that case by requesting bargaining with the employer, but in doing so noted that it found the employer's insistence on unlimited subcontracting to be untenable. Holiday Inn, 300 NLRB at 774. The employer responded it would maintain its position on subcontracting and pressed the union on whether its flexibility extended to unlimited subcontracting. Holiday Inn at 775. The union responded that it did not. Id. at 776.

Assuming *arguendo* that there was an impasse, the passage of time, as argued above, is an event that could break any deadlock found to exist. Moreover, there was scheduled bargaining on December 8-9, 2014 that never occurred and was never rescheduled. CWA tendered proposals to Dish on December 9, 2014 with the expectation of bargaining over them and Dish refused to schedule bargaining in early 2016 only because its chief negotiator had accepted another position. This unfulfilled bargaining obligation, another ground found by the ALJ to support the conclusion that impasse did not exist (Decision, pp. 13-14), and is discussed in detail below, is a fact that distinguishes the present case from Pepsi-Cola and Holiday Inn. Pointedly, in McAllister Bros., Inc., 312 NLRB 1121 (1993), another case relied on by Dish in its brief, the absence of an agreement to further bargaining dates supported the contention that the parties in that case were at impasse. McAllister Bros., 312 NLRB at 1122. In none of those

cases did the parties have an agreement to meet and bargain that was unfulfilled. The last round of proposals in Pepsi-Cola, Holiday Inn and McAllister Bros. had been discussed at their respective tables and such discussions did not occur at the bargaining table between Dish and CWA over the December 2014 proposals.

Another difference is that CWA made substantial movement on its wage proposal by limiting the QPC to current employees and offering a wage scale and Pi to new hires. Given the attrition at Farmers Branch of 31.40 % in 2014 and 19.60% in 2015 and the attrition at North Richland Hills of 30.50 % in 2014 and 13.10% in 2015 (R 33), the Union's proposal would have yielded a significant relief in overall wages at those two facilities because the persons hired as a result of attrition would not be working under the QPC. This fact distinguishes this case from Pepsi-Cola and Holiday Inn.

In regards to Holiday Inn, in that case the parties' correspondence expressly addressed subcontracting, the issue that led to impasse. The union called the employer out on the issue, the Company responded it was holding its position and asked if the union would be flexible and the union indicated it would not. Balonick, in his letters to Ramos, never expressly questioned the Union's flexibility on QPC. Despite not raising the QPC, Balonick faulted the Union for not stating it would be flexible on QPC when he was corresponding with Ramos in 2016. (Tr. 116-17). If Dish was trying to test the Union's flexibility, it could not expect the Union to pass the test if it did not know the question being asked of it. Balonick's conclusion that the Union was inflexible on the QPC is not supported by his correspondence with Ramos in 2016. Since Dish has the burden to prove impasse, his assumption based on an issue that was not expressly discussed in 2016 is insufficient to establish impasse under the reasoning of Holiday Inn. The

Board should accordingly affirm the ALJ's rulings, finding and conclusions as to the impact the passage of time had on the existence of an impasse.

4. Dish's change in bargaining representative undermines finding impasse

The ALJ also concluded that the change in Dish's bargaining representative "amplified the possibility of agreement, which also cuts against an impasse finding." (Decision, p. 13). The ALJ reasoned that the departure of Basara and his replacement with Balonick, "a more diplomatic representative," could have resulted in movement at the table. The ALJ premised this part of the decision on KIMA-TV, 324 NLRB 1148, 1152 (1997) and Airflow Research, which held

> The possibility for a break of the deadlock was further heightened by the change in the person representing the Union for negotiations. The Union had been represented by Melton during the earlier bargaining which led to impasse. A year later, Settles took over the role of representing the Union. This change created the possibility of a new approach toward the subjects of the earlier impasse. Airflow Research, 320 NLRB at 862.

Dish argues in its brief that these cases can be distinguished because the change in representative in these cases was on the Company side and the Company would always know its own position and if it had changed. (Brief, pp. 40-42). Dish's solipsistic reading of impasse law completely reads out of the duty to bargain the Union as an equal partner, deprives the Union of agency independent of Respondent, and reduces CWA to nothing more than a passive partner in the bargaining process.

The law does not support Dish's one-sided version of the bargaining process or impasse law. Impasse requires there be a contemporaneous understanding **by both sides** that negotiations had reached impasse. Essex Valley Visiting Nurses Assn., 343 NLRB 817, 841 (2004); Newcor Bay at 1239; CJC Holdings, 320 NLRB at 1045 ("Finally, while Respondent's understanding that

the parties were at impasse was clearly voiced by Respondent, it is equally clear that the Union did not share that viewpoint. Based on the fact that a number of agreements had been reached by the parties, and the further fact that even on the wage issue I have found no impasse to have existed, I find that the contemporaneous understanding of the state of negotiations by the parties fails to support Respondent's position that there was an impasse."); Taft Broadcasting, 163 NLRB at 478 (identifying "the contemporaneous understanding of the parties as to the state of negotiations" as a component of impasse).

If only Dish's position mattered, and if what only mattered what Dish knew to be in its heart, these precedents would have no place in the Board's canon. Instead, the law recognizes that a lack of mutual understanding as to the existence of an impasse can defeat the assertion of impasse. In this case, the removal of Basara and his replacement by Balonick created the possibility of movement in negotiations because a hostile bargainer, who noted himself in regards to his own departure that "I suppose that the good news for you is that I will not be representing DISH in the future." (GC 9, p. 1).

Finally, it should be noted that the willingness of one party to continue bargaining indicates that there is no deadlock, and thus no impasse, in the bargaining. Ead Motors, 346 NLRB at 1064; Newcor Bay, 345 NLRB at 1239. In Ead Motors and Newcor Bay, the Board found a willingness to return to the table even without specific additional concessions being offered sufficient to break impasse. Ead Motors at 1064; Newcor Bay at 1239. CWA never wavered in its willingness to bargain throughout December 2014 and into January, February, and April of 2016 in response to Dish's threats to unlawfully change employees' wages and working conditions. Whatever Dish had concluded in its own mind was immaterial as to the question of impasse because the other party demonstrated a willingness to meet. The Board should, for the

reasons argued above, affirm the ALJ's rulings, finding and conclusions as to the impact of Dish's change in bargaining representative on the question of impasse.

5. Dish's unwillingness to reschedule the December 2014 bargaining defeats impasse

The ALJ found that Dish's unwillingness to reschedule December 2014 bargaining dates undermined its claim that the parties were at impasse at the end of 2014. (Id., pp. 13-14). The scheduling of the December 8th & 9th bargaining dates shows impasse had not been reached, as does Dish's willingness to meet and bargain after it received CWA's proposals. Shangri-La Rest Home, 288 NLRB 334, 334 (1988) (the scheduling of a bargaining session for December 8, 1986, the date it declared impasse and withdrew recognition of the labor union, defeated the respondent's asserted impasse). Board law, as noted by the ALJ, does not permit an employer to declare impasse in response to the reasonable cancellation of a bargaining session. Bottom Line Enterprises, 302 NLRB 373, 374 (1991). As such, Dish could not seize upon the unfortunate circumstance of a death in Ramos's family to cancel bargaining and declare impasse.

Dish attacks this conclusion in its brief by arguing that the parties reached impasse as the result of Dish's receipt of the Union's proposals on December 9th. Dish claims that this exchange of proposals resulted from scheduling difficulties (Brief, p. 15), but offers no citation to the record to support the proposition that the parties agreed to bargain by mail. In fact, the record in this case is to the contrary. CWA provided proposals to Dish in December 2014 and stated explicitly in doing so that CWA would not waive its right "to meet with you and discuss face-to-face your response." (GC 22, p. 2). Dish did not object to the Union's position and responded on December 5th by stating "Please forward your proposals." (Id., p. 1). CWA

forwarded its proposals to Dish on December 9, 2014 and continued "to stand firmly on the need to bargain over our proposals." (GC 4, p. 1).

Dish did not respond to these proposals by claiming bargaining was unnecessary. To the contrary, Dish responded by offering to bargain the following week. (GC 98, p. 1). This offer to bargain the following week is inconsistent with both an agreement to bargain by mail and the existence of impasse. Why offer to meet if the parties were bargaining by mail? Why bargain at all if Dish believed upon receipt of the proposals that the parties were at impasse? The answers to these rhetorical questions undermine Dish's contention that impasse existed as of December 18, 2014. Dish had an unfulfilled bargaining commitment and CWA had shown movement suggesting that the issues between the parties could be resolved.

The decision by Dish, and its lead negotiator Basara, was correctly categorized by the ALJ "as more retaliatory than substantive, and are inconsistent with those of a labor law professional handling an impasse." (Decision, p. 14). This conclusion is also supported by the Board's holding in Ead Motors, where the NLRB held that "the scope and breadth of changes" sought by the employer rendered impractical the deadline imposed by the employer to complete negotiations because "the artificially truncated negotiation period was insufficient to allow meaningful discussion of the issues presented in these negotiations." Ead Motors, 346 NLRB at 1063 (citing Newcor Bay, 345 NLRB at 1239). CWA analogously faced a truncated period of time to complete negotiations that was apparently motivated in part by Dish's desire to complete negotiations prior to Basara's departure. Regardless, Dish's claim that impasse existed is undermined by its response to CWA's proposals where it agreed to further bargaining in December 2014. This fact undermines any claim that an impasse existed and the ALJ's rulings, finding and conclusions as to this issue should be affirmed.

c. Dish unlawfully refused to bargain

The ALJ found Dish to have unlawfully refused to bargain with CWA in violation of Section 8(a)(5) "by ignoring the Union's request to bargain since January 13, 2016." (Decision, p. 14). The ALJ premised this finding on Storer Communications, Inc., 294 NLRB 1056 (1989) and Rutter-Rex Mfg. Co., 86 NLRB 470 (1949). Additionally it should be noted in regards to this issue that the Board has held that an unlawful refusal to bargain results from an employer refusing to sit across the table and bargain with a union and instead insists on remote bargaining. Alle Arecibo Corp. 264 NLRB 1267 (1982); Duro Fittings Co., 121 NLRB 377 (1958). In this case, beginning with Ramos's demand to bargain in her January 13, 2016 letter to Balonick (GC 11), Dish has refused to bargain with CWA because, as discussed above, Respondent was allegedly testing the Union to see if additional bargaining would be fruitful through the exchange of correspondence with Ramos. Because the parties were not at impasse, Dish was obligated to meet and bargain. Its failure to do so, as found by the ALJ, violated Section 8(a)(5) and the ALJ's rulings, finding and conclusions as to the issue of Dish's unlawful refusal to meet and bargain should be affirmed.

III. The Constructive Discharges

a. The Hobson's Choice

"Under the Hobson's Choice theory of constructive discharge, 'an employee's voluntary quit will be converted to a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." Titus Elec. Contr., Inc. 355 NLRB 357, 357 (2010)(quoting Intercon I (Zercom), 33 NLRB 223, 223, n. 4 (2001)); *see also* White-Evans Co., 285 NLRB 81, 81-82 (1987) (holding that a constructive discharge for purposes of Section

8(a)(3) "involves an employee who quits after being confronted by his employer with the Hobson's choice of resignation or continued employment conditioned on the relinquishment of rights guaranteed by Section 7 of the Act."). The ALJ found Dish to have constructively discharged Marcus Tillman, David Dingle, Justin Ripley, Kenneth "Blake" Daniel, Bryce Benge, Salvador Bernardino, Preston Dutton, Robert Thompson, John Carson, Scott Dehart, Robert MacDonald, Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns, Christopher Little and Michael Cater by presenting them with "the ***Hobson's choice of either continuing to work or foregoing the rights guaranteed . . . under Section 7 of the Act.***" (Decision, p. 16 (emphasis in original), citing Remodeling by Oltmanns, 263 NLRB 1152, 1162 (1982)).

In Oltmanns, the employer, in relevant part, informed employees that it would no longer deal with the labor organization and would be reducing employee wages and imposing its own benefits. Oltmanns, 263 NLRB at 1162. The employer in Oltmanns was held to have constructively discharged its employees based on prior Board precedent that held, in relevant part, that an employer violates Section 8(a)(3) by offering "its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed conditions of employment or quitting their employment, and that 'forcing employees to make such a choice.... discourages union membership almost as effectively as actual discharge.'" Oltmanns at 1162 (citing and quoting William Augusto Fire Protection Services, 227 NLRB 204, 210 (1976).

The Board described the mechanics of this type of constructive discharge in Superior Sprinkle, Inc., 277 NLRB 201 (1976) as follows:

> Superior unlawfully refused to bargain with the Union and thus, as in Blue Cab, offered its employees the choice of accepting the employer's unlawful repudiation of its statutory bargaining obligations and working under unlawfully imposed

> conditions of employment or quitting their employment. Thus, the employees' continued employment would be conditioned upon their abandonment of rights guaranteed them under the Act, that is, the right to bargain collectively through representatives of their own choosing. Forcing employees to make such a choice; namely, to work under illegally imposed conditions or to quit their employment "discourages union membership almost as effectively as actual discharge." Superior Sprinkler, Inc., 227 NLRB 204, 210 (1976)(citations omitted).

The logic of Superior Sprinkler is applicable in this case. The dischargees had the rights under Section 7 to bargain through CWA and be free of unilateral changes absent the existence of a legitimate impasse. Those rights were taken from them when Dish in the absence of a valid impasse unlawfully imposed its wage cuts, resulting in a dramatic reduction in wages for the technicians. Dish's imposition of unlawful wages and working conditions were an infringement of the Section 7 right of the employee's to be free of such conditions. Dish undertook the wage cuts, per the Obere text, to force employees to quit. This course of conduct was action undertaken to undermine union support and supports affirmation of the holding that the termination of the constructive discharges violated Section 8(a)(3).

b. The choice faced by the dischargees

In this case, all of the alleged constructive discharges quit because of the unilateral changes in wages and working conditions imposed by Dish in April 2016. Cater resigned on June 3, 2016 because of wages. (CP 86, p. 1; Decision, p. 10, n. 11). Dutton resigned on May 31, 2016 because of the wage cut. (CP 86, p. 5). Dehart also resigned because of wages. (Id., p. 6; Tr. 748-49). Robert MacDonald also resigned because of the wage cut. (Id., p. 9). Hernandez resigned because of the wage cut. (Id., p. 10; Tr. 748-49). Dingle resigned because of wages. (CP 88, p. 2). Kubesch resigned because of the wage cut. (Id., p. 4). Benge resigned because of the wage cut. (Id., p. 5). Carson resigned because of the wage cut. (Id., p. 7). Tillman, Thompson, Ripley, Burns, and Carson all quit because of the wage cut. (Tr. 748-49). Dingle left

because of the pay cut. (Tr. 243). Little quit because of the pay cut. (Tr. 649). Daniel quit because of the pay cut. (Tr. 675-76). Mason quit because of the pay cut. (Tr. 192, 275, 525). Benge quit as well because of the pay cut. (Tr. 729-30). Bernardino quit because of the pay cut. (Tr. 737-38).

Dish's unilateral wage cuts and changes to benefits in 2016 conditioned continued employment on the acceptance of these terms, which were imposed in violation of the Act. The constructive dischargees refused to accept these terms and quit rather than forego their Section 7 right to be free of such unlawful conditions. Their terminations are violations of Section 8(a)(3) and the ALJ's rulings, finding and conclusions as to the constructive discharge of these employee's under the Hobson's Choice theory should be affirmed.

IV. In the alternative, the wage cuts violated Section 8(a)(3) and there existed unlawful motive for the constructive discharges

In the alternative and in addition to the 8(a)(5) impasse and unilateral change theories, discussed above, that the ALJ relied on in issuing his ruling, the wage cuts can also be found[2] unlawful under Section 8(a)(3) by application of the Board's Wright Line analysis. This motive inquiry can also be applied as an alternate reasoning for sustaining the constructive discharges.

a. Wright Line *Analysis*

The Board's traditional motive analysis for Section 8(a)(3) violations was established in Wright Line, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982); *see also* NLRB v. Transp. Mgmt. Corp., 462 U.S. 393, 395 (1983) (noting with

[2] The ALJ determined that reaching this theory of the case was unnecessary and cumulative. (Decision, p. 17). The Board can use this theory to resolve Respondent's objections because the Board "functions in certain respects like an appellate court" and has "'independent power to identify and apply the proper construction of governing law." Dish Network Corp., 359 NLRB 311, 312 (2012)(quoting Kamen v. Kemper Financial Services, 500 U.S. 90, 99 (1991)).

approval the Board's approach adopted in Wright Line). This framework applies not only to cases of employee discipline but other instances of employer retaliation for protected, concerted activity. Pittsburg & Midway, 355 NLRB 1210, 1212 (2010) (applying Wright Line to a case where employees were retaliated against for taking days off as prescribed by their labor contract.); Willamette Indus., 341 NLRB 560, 562-63 (2004) (changes to working conditions in response to support for a union).

Under Wright Line**,** the General Counsel carries the burden of persuading by a preponderance of the evidence that the protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action. T. Steele Constr., Inc., 348 NLRB 1173, 1183 (2006); Willamette Indus., 341 NLRB at 562. Proof of unlawful motivation can be established by direct evidence or inferred from circumstantial evidence based on the whole of the record. Robert Orr/Sysco Food Services**,** 343 NLRB 1183, 1184 (2004); Embassy Vacation Resorts, 340 NLRB 846, 848 (2003). Likewise, under non-Hobson's choice constructive discharge theory, it must be established that onerous working conditions were placed on an employee to force her or his resignation in retaliation for union activities. Crystal Princeton Refining, 222 NLRB 1068, 1069 (1976).

b. Evidence of unlawful motive

In this case, there is direct evidence of Dish's unlawful motive as to the wage cuts and the constructive discharges in the form of Obere's text stating that the Dish wanted the employees to quit. Field Service Manager Thomas's testimony that another manager told him Dish was bargaining to get rid of the Union also supports finding an unlawful motivation on the part of Dish as to the wage cuts as well as the constructive discharges. (Tr. 231-32, 999).

Under Wright Line, the respondent's unlawful motivation can be established by showing union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. T. Steele, 348 NLRB at 1183; Willamette Indus., 341 NLRB at 562; Senior Citizens Coordinating Council, 330 NLRB 1100, 1105 (2000); Regal Recycling, Inc., 329 NLRB 355, 356 (1999). Again, the Obere text and Thomas's testimony establish animus. Dish's interest in recovering its expenditures in attorney's fees and cost by cutting wages, as will be developed below, is also an unlawful motive for purposes of the Section 8(a)(3) Wright Line analysis. This evidence provides animus for the wage cuts themselves as well as the constructive discharges under the traditional, non-Hobson's Choice theory of constructive discharge.

Once a discriminatory motive under Wright Line has been established, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. T. Steele at 1183; Senior Citizens Coordinating Council, 330 NLRB 1100, 1105 (2000). Under this dual motive framework, an employer's burden is not met by showing that a legitimate reason factored into its decision; rather, the employer must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities. T. Steele at 1183; Monroe Mfg., 323 NLRB 24, 27 (1997). The absence of impasse in this case deprives Dish of legitimate motive for imposing the wage cuts. Further, Dish has never articulated a reason not tainted by an unlawful motive for paying Union employees less than it pays other employees in the area. Dish therefore cannot establish a rebuttal case under Wright Line. Dish also cannot maintain, as argued below, that the cuts were not retaliatory in nature. This logic applies with equal force the constructive discharges that resulted from the wage cuts.

c. The retaliatory nature of the wage cuts

Liability under Wright Line as to the wage cuts and constructive discharges is also supported by evidence of Dish stating at the bargaining table that it was proposing wages below what it pays non-union Dallas-Fort Worth area employees because of Dish's desire to recoup the costs it incurred in negotiations and NLRB trials as a result of FB and NRH voting to join CWA. This below-market pay scale was implemented by the unlawful wage cuts Dish on April 23rd.

The Union's August 16, 2012 notes[3] reflect Basara stating to Bentley

> But you've already taken 2 things to the NLRB and that's been costly. We've probably spent easily 6 figures on attorney fees, time and effort in dealing with the unfair labor practices charges and termination cases. I find it to be a fascinating strategy that you come here and say let's have a contract but while we're here we're going to attack you in 30 different ways. Then you say trust us in arbitration--we only take things we need to take. It's hard for me to believe you. Actions are 'play ball or we're going to file charge after charge'. (Tr. 320; GC 35, p. 2).

Basara made this comment to Bentley again in October 2012 following a discussion on wages or arbitration by stating "it had cost the Company half a million dollars and they don't forget that." (Id., p. 8). According to the Union's notes, Basara and Bentley had the following exchange that is evidence of Dish's intent to punish the bargaining unit for prior Board proceedings, which put

[3] Evidence of events outside the limitations period provided in 29 U.S.C. § 160(b), Section 10(b) of the Act, is relevant "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events." Int'l Ass'n of Machinists v. NLRB, 362 U.S. 411, 416 (1960); *see also* Fruehauf Trailer Services, 335 N.L.R.B. 393, 405 (2001) (holding "he evidence of conduct outside the 10(b) period may properly be received as background, and considered as part of the analysis of the legality of the conduct within the 10(b) period.") In this case, the acts by Dish at issue in this case within the 10(b) period are the unilateral changes, refusal to bargain, and constructive discharges.

another way equates to teaching the employees not only the futility of the Act, but the costs of exercising those rights

> DB: On wages, I left here thinking that based on this proposal and your comment yesterday, because these two groups are represented by the union, the company's position is that they should make less money than the other 7000 technicians in the company.
>
> GB: And your position is that they should make more. You phrase it because they're represented. That's only true in part. Think about the cost the company's incurred so far dealing with the representation. And the cost the company going forward dealing with the representation. When you say they're being paid less because they're being represented, they're being paid less because the cost of being represented are greater than the cost of non-representation. (GC 43, p. 1).

Basara continued on this subject by stating

> So when you say you're paying them less because their represented, I can tell you this. This company has probably paid half a million dollars in defending frivolous charges by you guys. And everyone of them. I didn't lie. So you ask is it going to be less? Yes, it's going to be less. So I'm no (sic.) lying to you about that either. (Tr. 319; GC 43, p. 4)

Basara concluded the discussion by stating, in response to a question about those expenses being incurred as a result of bargaining, "You think you can just come in and say well I cost you half a million dollars and give you the same thing you're giving everybody else? Would you?" (Id.).

Basara returned to this point during the August 27, 2013 bargaining session. As the Union's notes for this session indicate, Basara stated in regards to who has the power vis-à-vis the Union and the Dish,

> Yes we do on this side of the table. So we can drive as hard a bargain as we want to drive. Nothing unlawful about it. You can try and claim it is. But it's not. And you seem to what to also not recognize and I know it wasn't you're doing but the cost that has been accrued to date to be honest with you by the foolishness your legal console. I realize it's not your responsibility but it's a lot of money for nothing I mean a lot of money for nothing and that was really expensive to deal with and it was unreasonable he was appealing cases that shouldn't be appealed it was observed so it's very costly I mean we are in 6 figures easy and you allowed

> him to do it even after I tried to tell you to stop him and he still did it. (GC 45, p. 1).

This drumbeat by the Dish to punish the bargaining unit employees for the costs of dealing with a represented unit and fees defending NLRB charges raised Basara at the hearing when he testified

> We also had other issues on the table, but at this point, we had also spent countless -- I mean, I can't even imagine, a hundred thousand was spent given all of the charges and everything else that was in this case, and so we're going to spend all of this money, right, and now in the end, "Why didn't you just offer Pi?" Well, that wasn't my strategy. (Tr. 1150).

Dish's intent to punish employees for joining CWA is clear. Dish stated at the bargaining table that its motive to for the wage cuts was punish bargaining unit employees for the costs Dish incurred as a result of selecting CWA as their bargaining agent. The imposition of wage rates below those paid in the Dallas-Fort Worth area and denying bargaining unit employees Pi is evidence that Dish sought to penalize these employees for their support of the Union. Dish's statements at the bargaining table are evidence of the motive behind it imposing a wage rate below what it pays other area employees and this evidence is relevant to establishing an overall course of retaliatory conduct that resulted in wage cuts at issue in this case and the terminations of the constructive dischargees. Dish cannot excuse this speech as protected speech under Section 8(d) or tough bargaining. These statements are evidence of unequivocal retaliatory intent. This evidence proves beyond a doubt that Dish sought through its low wage scale to punish employees for selecting a representative for the purpose of collective bargaining and for the costs that representation had imposed on Dish. Dish's intent to penalize its employees for the costs it incurred led to both the unlawful wage cuts and the unlawful terminations of the constructive dischargees. Dish's conduct in imposing this wage rate resulted economic harm to

employees who remained with Dish and in the constructive discharges at issue in this case. These violations of Section 8(a)(3) should be held by the Board to constitute and additional or alternate ground for finding the wage cuts and constructive discharges violated the Act.

V. Conclusion

For all of the above and foregoing reasons, Charging Party Communications Workers of America prays that the decision of Administrative Law Judge Robert A. Ringler be affirmed in all respects, or otherwise sustained under the alternative theories advanced above, and Respondent Dish Network Corporation be held to have violated Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act in accordance with the January 23, 2017 ALJ decision. CWA further prays that these violations of the Act be remedied in accordance with the ALJ's recommended order and that Respondent be order to take affirmative steps to cure these violations by posting a notice to employees as outlined by the ALJ, restore the pre-unilateral change status quo for benefits and wages, including restoration of the QPC as the wage rate for technicians, and reinstatement of Marcus Tillman, David Dingle, Justin Ripley, Kenneth "Blake" Daniel, Bryce Benge, Salvador Bernardino, Preston Dutton, Robert Thompson, John Carson, Scott Dehart, Robert MacDonald, Severo Hernandez, Aaron Mason, Aaron Kubesch, John Burns, Christopher Little, and Michael Cater. CWA further prays that the Board order appropriate backpay for all aggrieved employees, and that all such aggrieved employees be otherwise made-whole for their respective losses.

Dated: March 7, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsel for the General Counsel and Counsel for Respondent by electronic mail and overnight delivery on this 7th day of March 2017:

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